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No. 172

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In the Supreme Court of the United States

OCTOBER TERM, 1962

OUE GUSTAVSSON CONTRACTING CO., INC., PETITIONER

v.

FRANKLIN G. FLOETE, AS ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION, MICHAEL BRENNAN, INDIVIDUALLY AND AS CONTRACTING OFFICER OF GENERAL SERVICES ADMINISTRATION, AND WILLIAM A. BOYD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York is reported at 187 F. Supp. 839. The opinion of the court of appeals (Pet. 31-41) is reported at 299 F. 2d 655.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1962. Petition for rehearing or for rehearing *en banc* was denied on March 13, 1962.* The petition for a writ of certiorari was filed on June 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the suit was properly removed to the United States District Court pursuant to 28 U.S.C. 1442(a).

2. Whether respondents, contracting officers employed by the United States, are immune from liability in a civil action grounded upon their intra-agency report recommending that petitioner's construction contract with the Government be terminated for unsatisfactory performance.

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* The petition for rehearing in the court of appeals appears to have been out of time. Rule 25(a) of the Rules of the United States Court of Appeals for the Second Circuit provides that: "Any petition for rehearing shall be filed with the clerk of the court within 15 days from the filing of the opinion in the clerk's office." The judgment of affirmance was filed in the court of appeals on February 5, 1962, but the petition for rehearing was not filed until Wednesday, February 21, 1962. There is no indication whether the court below considered the petition on its merits. See Pet. 12; *Bowman* v. *Loperena*, 311 U.S. 262, 266.

STATUTE INVOLVED

United States Code, Title 28, Section 1442:

Federal officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office

STATEMENT

This is a tort action, for malicious interference with contract rights, against two contracting officers of the General Services Administration (GSA). The malicious interference allegedly occurred when the respondents recommended in a report to GSA that petitioner's construction contract with the United States be terminated for unsatisfactory performance. The pertinent facts may be summarized as follows:

Petitioner entered into a contract with GSA for the construction of a dehumidification hutment for the United States (Pet. 32-33). The respondent Brennan was the Government contracting officer, and respondent Boyd was his assistant (*Ibid.*). Petitioner did not complete the work in the time period prescribed by the contract, and was granted an extension (*Ibid.*). After further delay, respondent Boyd conducted an investigation and thereafter recommended to respond-

ent Brennan that the Government should terminate the contract, pursuant to a termination clause in the contract, because of unsatisfactory performance (Pet. 33-34). Brennan agreed, and submitted a report to the Washington office of GSA, which in turn approved the report and authorized termination of the contract (Pet. 34).

Petitioner thereafter prosecuted an administrative appeal to the Administrator of GSA, Franklin G. Floete (Pet. 34). It also brought suit against the Administrator and the respondents in the District Court for the Southern District of New York, seeking to enjoin them from awarding the contract to another contractor, to review the decision terminating the contract, and damages (*ibid.*). This action was dismissed for lack of jurisdiction. *Ore Gustavson Contracting Co., Inc.* v. *Floete*, 176 F. Supp. 544, affirmed, 278 F. 2d 912 (C.A. 2), certiorari denied, 364 U.S. 894.

While the appeal in the above action was *sub judice*, petitioner instituted this proceeding in the Supreme Court of the State of New York (Pet. 34). The complaint alleged two causes of action. The first cause of action was against the Administrator Floete and respondent Brennan "in their representative capacities" (Pet. 35). The second claim, against the respondents Brennan and Boyd, alleged that they maliciously caused the termination of the contract by making false reports concerning petitioner's performance of the contract (Pet. 7, 35). On petition of the respondents, the action was removed to the District Court for the Eastern District of New York pursuant

to 28 U.S.C. 1442(a) (Pet. 34). Petitioner filed a motion in the district court to remand the suit to the New York State courts, but the motion was denied. See *Oce Gustavsson Contracting Co., Inc.* v. *Floete*, 176 F. Supp. 841.

Petitioner moved the district court to sever the second cause of action and remand it to the state courts of New York on the ground that, since petitioner was suing respondents "individually" for a common law tort, the district court lacked jurisdiction over the second cause of action (Pet. 11). The district court dismissed the first cause of action, and the claim against the Administrator subsequently was abandoned in the court of appeals (Pet. 35). Treating the respondents' motion to dismiss the second cause of action as a motion for summary judgment (Pet. 35), the district court ruled that respondents were immune from civil liability. 187 F. Supp. 839, 840. The district court again denied the motion to remand.

The court of appeals affirmed on the ground that federal officers are immune from civil actions based upon acts performed within the scope of their duties and which necessarily involve the exercise of judgment and discretion. The court ruled that the acts complained of here—the reports prepared by the respondent contracting officers concerning petitioner's performance of the contract—were made in the course of the respondents' official responsibilities. Noting that the reason for the rule granting federal officers immunity from civil actions is to permit government officials to perform their duties without fear of harass-

ment or retaliation, *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949, the court declared (Pet. 36-37):

> The applicability of this rule to the circumstances of this case is obvious. Except for "the most resolute, or the most irresponsible," a Governmental official whose duty it is to inspect the performance of Government contracts would indeed find it difficult honestly and independently to pass upon such work if he knew that an unfavorable report, coupled with an allegation of falseness and malice, could subject him to the risk, the inconvenience and the embarrassment of a public trial and to possible personal liability, as a result of which he might lose his home, his automobile, his savings and whatever other property, real or personal, he might possess. Furthermore, it cannot be said that the allegedly injured party is wholly without remedy. The appeal to the administrative agency itself, when not delayed by the possible effect of an attempt to litigate the same issues in court, is a far from perfunctory affair; and, in the event the cancellation order is sustained, the Administrative Procedure Act offers relief by way of a limited court review. Suit against the Government may lie in the Court of Claims. 28 U.S.C. Section 1491. Nor is it to be assumed that the executive branch of the Government will condone or overlook such acts of dishonesty and malice by officials charged with the performance of such duties as those exercised by the defendants.

Circuit Judge Waterman concurred in the result of the court on the ground that the (Pet. 41)

allegations of wrongdoing demonstrate that the alleged tortious acts of these particular defendants not only occurred in the necessary course of their obviously important official duties as contracting officers of the General Services Administration but were acts required of them if they were conscientiously to perform those duties.

ARGUMENT

The decision below is plainly correct and there is no occasion for further review by this Court.

1. The removal question raised by petitioner does not warrant this Court's consideration. Petitioner's assumption (Pet. 11) that the question of whether the removal was proper is to be determined by an examination of the complaint is without foundation. There is no requirement that the federal defense justifying a removal under 28 U.S.C. 1442 must appear on the face of the complaint. *Gay* v. *Ruff*, 292 U.S. 25, 33-34; *Poss* v. *Lieberman*, 299 F. 2d 358 (C.A. 2), certiorari denied, June 25, 1962; Hart and Wechsler, *The Federal Courts and the Federal System*, 763, n. 1.

Petitioner's argument that the district court erred in refusing to remand its cause of action against the respondents because petitioners' claim was brought against them "personally" and should, therefore, be

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Judge Waterman did not concur in that part of the court of appeals opinion which extended immunity to all government officials performing official duties involving the exercise of judgment and discretion.

determined by state common law principles also is baseless. 28 U.S.C. 1442(a) expressly provides for removal where a civil action for damages is brought against a federal officer, or a person acting under him, and is based upon any act taken under color of his office. It is clear that respondents were, individually, either an "officer of the United States," or a "person acting under him" within the plain meaning of 28 U.S.C. 1442(a) and that this suit is for an "act under color of such office." Furthermore, contrary to petitioner's assumption, suits of this nature are to be determined by federal, not state, law. *Howard* v. *Lyons*, 360 U.S. 593, 597. The courts below were therefore correct in holding that this suit was properly removed to the federal court.

2. There is also no need for further review of the determination that respondents are immune from civil liability under the rules enunciated in *Barr* v. *Matteo*, 360 U.S. 564, and *Howard* v. *Lyons*, 360 U.S. 593. In *Barr* and *Howard*, this Court held that federal employees have an absolute privilege against suits for damages incurred as a result of actions taken by the employees within the scope of their official duties, even if it is alleged that such actions were motivated by malice or an otherwise improper motive. In the instant case, it is clear that respondents, in making the allegedly tortious report recommending termination of petitioner's construction contract, were performing duties committed to their control and responsibility as contracting officers. As the court below stated, "[i]t is clear and uncontested, however, that reports on the performance of Government contracts

are made in the course of [respondents'] jobs . . . ." (Pet. 38). See also Pet. 46, 47.

Moreover, the alleged malicious interference with petitioner's contract rights occurred when respondents made their report to GSA recommending termination of the contract. Yet, the courts have long recognized that statements made in internal agency reports are absolutely privileged, in actions for libel, because of the "need for a free flow of information within every executive department." *Barr* v. *Matteo*, *supra*, at 582 (dissenting opinion). See, also, *Lyons* v. *Howard*, 250 F. 2d 912 (C.A. 1), reversed on other grounds, 360 U.S. 593; *Preble* v. *Johnson*, 275 F. 2d 275 (C.A. 10); *United States* v. *Brunswick*, 69 F. 2d 383 (C.A. D.C.); *Farr* v. *Valentine*, 38 App. D.C. 413; *De Arnaud* v. *Ainsworth*, 24 App. D.C. 167; *Poss* v. *Lieberman*, 299 F. 2d 358 (C.A. 2), certiorari denied, June 25, 1962.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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